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No. 00-434

Supreme Court, U.S.
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In the Supreme Court of the United States

FORD OLINGER,

Petitioner,

v.

UNITED STATES GOLF ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181, *et seq.*, applies to the competition areas of championship-level athletic competitions held at places of public accommodation.

2. Whether, if so, Title III requires the organizers of championship-level athletic competitions (a) to consider applications for selective waivers of the substantive rules of those competitions in order to accommodate disabled competitors, and (b) in considering such applications, to undertake a comparison of disabled competitors and hypothetical able-bodied competitors as part of the individualized "reasonable modification" inquiry required under Title III, in order to accommodate disabled competitors.

RULE 29.6 STATEMENT

Respondent United States Golf Association is a private, not-for-profit association of member golf clubs and golf courses.

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Sandison v. *Michigan High Sch. Athletic* Ass'n, 64 F.3d 1026 (6th Cir. 1995) 16, 17

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42 U.S.C. § 12181(7)(L) 8, 11

Other Authorities:

Dave Addis, *Can Allowances For Disabilities Work In Sports?*, VIRGINIAN-PILOT & LEDGER-STAR, JAN. 18, 1998 24

Jeff Babineau, *Fiori Makes Cart Inquiry*, GOLFWEEK, Mar. 18, 2000 (www.golfonline.com/news/golfweek/2000/march /fiori0318.html) 13, 20

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Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans With Disabilities Act*, 18 LAW & INEQ. J. 131 (Winter 2000) 23-24

Is Competitive Golf Different in Different States?, DON KRAMER'S NONPROFIT ISSUES, March 2000 (www.nonprofitissues.com/lead/100mar.html) 19

Jones Says Competing Is His Victory, AP June 19, 2000, ¶ 2 (www.espn.go.com/golfonline/tours/s/2000/0619/ 593987.html) 20

Mark R. Madler, *Fed Circuits Suddenly Split on Handicapped Golfers*, Mar. 9, 2000 (www.lawnewsnetwork.com/stories/A18189-2000Mar8.html) 19

Gary Reinmuth, *Struggle to Make Field Goes Overtime*, CHICAGO TRIBUNE, July 4, 2000 22

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Robert S. Shwarts, *A Good Walk Spoiled: The 9th Circuit Improves Its Lie*, Mar. 23, 2000 (www.lawnewsnetwork.com/opencourt/stories/A19345-2000Mar22 .html) 19, 23

ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE (7th ed. 1993) 10

BRIEF FOR THE RESPONDENT

Respondent United States Golf Association ("USGA") agrees that this Court should grant the petition for a writ of certiorari. For the reasons set forth below, the USGA urges the Court to grant review and resolve the important issues raised by the Seventh Circuit's decision in this case and the Ninth Circuit's contrary ruling in *Martin* v. *PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3023 (U.S. July 5, 2000) (No. 00-24).

STATEMENT

1. Background

a. Petitioner Ford Olinger filed this action against the USGA under Title III of the ADA, 42 U.S.C. §§ 12181-12189. He sought preliminary and permanent injunctive relief prohibiting the USGA from enforcing its rule requiring all competitors in the United States Open Championship ("the U.S. Open") to walk during the U.S. Open and its qualifying rounds. Olinger suffers from avascular necrosis, a degenerative condition that has damaged his hips and causes severe pain. The USGA agrees that Olinger is disabled within the meaning of the ADA.

By the common and voluntary consent of the golf community, respondent USGA is regarded as the governing body of golf within the United States. The USGA is concerned with virtually every aspect of the game of golf, especially preserving the integrity of the game and the conditions under which it is played. Each year, the USGA conducts national championships in each of thirteen designated categories (*e.g.*, U.S. Women's Open, U.S. Senior Open, U.S. Amateur, etc.).

b. The U.S. Open is the men's national championship of golf in the United States, and, as the Seventh Circuit noted, it is by "consensus * * * the greatest test in golf." Pet. App. 4a. It is not a mere shot-making contest. Rather, at its core, it is *athletic* competition at the highest level.

The USGA selects difficult golf courses for the U.S. Open, and compounds the difficulty by making the course conditions extremely challenging. The rough is grown longer than normal, the holes are placed in difficult positions on the greens, and the tee boxes are moved back to maximize the distance on each hole. Moreover, because the U.S. Open is held in June, "Open week is very often hot and humid, the pressure builds each day, and every mistake is magnified, especially on Sunday afternoon," when (barring a playoff) the final round is played. JOHN FEINSTEIN, A GOOD WALK SPOILED 333 (1995). In fact, "[i]t is often said that the toughest eighteen holes in golf are the last eighteen at a U.S. Open," because "[t]he combination of the heat, the rough, the greens, and the pressure leaves everyone drained even before the last round begins. Once it starts, it only gets worse." *Id.* at 352.

The U.S. Open has been conducted every year since 1895, with the exception of the war years 1917-18 and 1942-45. It is usually played on four consecutive days, but at times requires more than one round in a single day. The golfer who has the lowest number of strokes over the full 72 holes (or any required playoff, which is a minimum of 18 holes) is the national champion. In 30 of the 100 U.S. Opens played to date, two or more competitors were tied at the end of regulation play, so that a playoff was needed to determine the champion. TR 130.[1]

The field in the U.S. Open is limited to 156 golfers. Approximately 56-60 golfers are exempted from preliminary qualifying on the basis of published criteria. The non-exempt places in the U.S. Open field are determined by a two-step preliminary qualifying (Local Qualifying and Sectional Qualifying).

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[1] The trial transcript is cited as "TR __"; the transcript of the preliminary injunction proceedings is cited as "PI __".

Local Qualifying for the 1998 Open was conducted on various dates in mid-May 1998, with a single 18-hole round at each of 90 qualifying sites around the country. TR 129. Of the 6,881 competitors who participated in Local Qualifying, approximately 750 advanced to Sectional Qualifying, which is 36 holes in a single day. TR 129-30.

During the U.S. Open, spectators are not allowed inside the ropes that separate the golf course and the competitors from the gallery. PI 50; TR 122. Although ropes are not physically placed on the golf courses used in the Qualifyings (because there are relatively few spectators), the spectators are expected to (and ordinarily do) afford to the players the normal courtesies that are associated with the conduct of a championship-level golf tournament. TR 92. Outside the ropes — *i.e.*, in the spectator areas — the U.S. Open is in compliance with Title III of the Americans With Disabilities Act.

c. The Rules of Golf consist of 34 separate rules and appendices, totaling 144 pages in all. In addition, the USGA has published hundreds of interpretations of those Rules, applying the Rules to myriad specific facts and circumstances. Although the Rules of Golf do not expressly preclude the use of golf carts, the Rules empower the committee in charge of the competition to set conditions for each event, including whether to prohibit the use of automotive transportation. PI 57, 59; TR 132, 145.

The USGA requires competitors in the U.S. Open to walk the course because the physical endurance and stamina of the competitors are very important parts of the test to which the competitors are subjected in championship-level golf competitions. PI 48; TR 133. Walking the course is (and always has been) a condition of competition in the U.S. Open and its Qualifyings; players have always walked during the competition since the first U.S. Open in 1895. PI 52; TR 133.

In 1998, Olinger requested a waiver of the rule requiring all competitors to walk the course in the U.S. Open and its

Qualifyings. Pursuant to the Conditions of the Competition for the U.S. Open and its Qualifyings, the USGA denied Olinger's request. Olinger then commenced this litigation a few days before the 1998 Local Qualifying. After a brief hearing, the district court issued a preliminary injunction permitting Olinger to use a golf cart in the 1998 Local Qualifying.

Olinger failed to advance to Sectional Qualifying in 1998, but he pressed his case for a permanent injunction allowing him to use a golf cart in future U.S. Opens (and in the qualifying rounds), and the USGA sought a contrary declaratory judgment. After a two-day bench trial in May 1999, the district court issued a 23-page opinion concluding that allowing Olinger to use a golf cart in the U.S. Open would fundamentally alter the nature of that national championship, and therefore is not required under the ADA. The Seventh Circuit affirmed.

2. The Proceedings Below

a. In considering Olinger's waiver request, the district court first concluded (incorrectly in our view) that the ADA applies to the competition areas of the U.S. Open and its Qualifyings (*i.e.*, the areas between the gallery ropes). Pet. App. 23a-25a. The district court nevertheless concluded, for several reasons, that the USGA was not required to grant the requested waiver.

The district court found that the purpose underlying the rule that all competitors must walk the course is that "the tournament is intended to serve as a test of stamina — of physical conditioning and ability to deal with stress." Pet. App. 28a. As the court summarized, "[t]he set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress." *Id.* at 35a.

Because of the importance of stamina in championship-level golf, the district court concluded that "the use of a cart can provide a golfer with a competitive advantage over a golfer who

walks." Pet. App. 30a. And while "[t]he extent of that advantage no doubt is variable and unmeasurable" — and, in fact, "would vary with temperature, humidity, terrain, number and types of strokes * * * and probably would vary with the nature and extent of the person's disabilities" — a "strong possibility exists that on any particular day, such a competitive advantage might exist, and that it might be substantial," and perhaps even dispositive in light of the many close finishes in past U.S. Opens. *Id.* at 32a.

The district court also held that requiring evaluation of individual requests for waivers of the rule prohibiting the use of carts would impose an undue administrative and financial burden on the USGA. Pet. App. 33a. As the district court noted, in order to evaluate waiver requests such as Olinger's, the USGA would "need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete." *Id.* This, the district court concluded, the USGA need not do. *Id.*

Finally, focusing on the specific "nature of the 'program,'" the district court concluded that

> [t]he point of an athletic competition * * * is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor. The set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress. The accommodation Mr. Olinger seeks, while reasonable in a general sense, would alter the fundamental nature of that competition.

Pet. App. 35a. The district court thus determined that a waiver of the walking rule would destroy the uniformity of rules for all competitors in a championship-level athletic competition. "To require that someone be given the discretion to allow one competitor a potential advantage denied to others" — as Olinger's

requested modification of the rules would require — "would fundamentally alter the nature of the competition." *Id.* at 34a.[2]

b. The court of appeals affirmed. Initially, the court discussed in some detail the USGA's contention that Title III does not apply to the competition areas of the golf courses used in the U.S. Open, and commented that "there may be some logic to this contention." Pet. App. 9a. The court of appeals ultimately chose, however, to rest its decision on the same grounds on which the district court had resolved the case.

As the court of appeals explained, in light of *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), "courts have repeatedly held that the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." Pet. App. 10a. In addition, the court of appeals noted that "under both the Rehabilitation Act and the ADA, courts consistently have concluded that an accommodation is not reasonable if it imposes an undue financial and administrative burden." *Id.* at 10a-11a. Applying those principles, the court of appeals agreed with the district court's conclusions that allowing an individual waiver of the rule that a competitor must walk the course would fundamentally alter the nature of the U.S. Open, and would impose an undue administrative burden on the USGA. *Id.* at 11a-14a.

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[2] Petitioner's criticism of "the nature and quality of USGA's evidence in support of its contention of fundamental alteration" (Pet. 6) is misplaced. The Seventh Circuit held that the district court's findings with respect to the fundamental alteration inquiry "are amply supported in the record." Pet. App. 11a. The Seventh Circuit then summarized excerpts from the record that supported the district court's conclusions, including statements from Petitioner's "own expert witness." Pet. App. 11a-13a.

The court of appeals noted the importance of stamina to the set of qualities tested in the U.S. Open, and agreed with the district court's assessment that a waiver of the walking rule would lessen the importance of that quality. Pet. App. 11a-13a. The court of appeals also stressed the "nature of the 'program,'" quoting the district court's observations that "[t]he point of an athletic competition * * * is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor." *Id.* at 11a. In the U.S. Open, that set of tasks "includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress." *Id.* The court of appeals also agreed with the district court that the ADA does not require the USGA to develop and fund a procedure for evaluating individual waiver requests, concluding that the imposition of such a requirement would impose an "unnecessary" administrative burden on the USGA. *Id.* at 13a.

3. The *Martin* Litigation

a. Meanwhile, parallel litigation between Casey Martin and the PGA Tour was proceeding on roughly the same schedule in the Ninth Circuit, but with an entirely different result. In *Martin*, a federal magistrate judge in Oregon determined that allowing Martin to use a golf cart would not "fundamentally alter" the nature of the Nike Tour competitions in which he participated. The magistrate judge opined that "the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making," but that for an able-bodied competitor "the fatigue factor * * * cannot be deemed significant under normal circumstances." *Martin* v. *PGA Tour, Inc.*, 994 F. Supp. 1242, 1250, 1253 (D. Or. 1998). The magistrate judge then undertook what he called an "individualized inquiry into the necessity of the walking rule in Casey Martin's case," and concluded that, because of Martin's disability, the "fatigue [Martin] endures * * * is undeniably greater than the fatigue injected into tournament play on the able-bodied by the

requirement that they walk from shot to shot." *Id.* at 1249, 1251. The magistrate judge compared hypothetical, able-bodied competitors with Martin, and on the basis of that comparison concluded that the purpose of the walking rule — to subject competitors to stress and fatigue — would be achieved even if Martin were allowed to use a golf cart. *Id.* at 1251-52.

b. The Ninth Circuit affirmed. Like the district court, it declined to compartmentalize golf courses used in championship-level tournaments into (i) competition areas that are off limits to the general public and (ii) spectator areas that are a place of public accommodation. Instead, relying on section 12181(7)(L) of the ADA, 42 U.S.C. § 12181(7)(L), the Ninth Circuit concluded that "golf courses are public accommodations." 204 F.3d at 997. The court then upheld the magistrate judge's conclusion that allowing Martin to use a golf cart would not fundamentally alter the nature of the competitions on the Nike Tour. *Id.* at 999-1002. The court stressed that, in light of the level of stress and fatigue experienced by Martin vis-à-vis his able-bodied competitors, "providing Martin with a golf cart would not give him an unfair advantage." *Id.* at 1002.[3]

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[3] After the Oregon magistrate judge ruled in favor of Martin, the USGA, acting on an *ad hoc* basis through its Championship Committee, waived the walking requirement for Martin in the 1998 U.S. Open and its Qualifyings. PI 54-61. The USGA chose this course of action out of voluntary deference to the magistrate judge's ruling, believing that, although the *Martin* ruling was not legally binding on the USGA, respect for the judicial system made voluntary deference an appropriate decision pending further review. PI 13-14, 51, 54, 69. Although the USGA had the right to do otherwise, the USGA believed that it would have been an unsound exercise of judgment to require Martin to litigate separately against the USGA during the pendency of the appeal in his action against

(continued...)

ARGUMENT

Respondent agrees with petitioner that this case raises issues worthy of this Court's review and is an appropriate vehicle — indeed, the most appropriate vehicle — for resolution of those issues. In particular, the case raises two important questions: (1) whether Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181, *et seq.*, applies to the competition areas of championship-level athletic competitions held at places of public accommodation and, (2) if so, whether Title III requires the organizers of championship-level athletic competitions (a) to consider applications for selective waivers of the substantive rules of those competitions in order to accommodate disabled competitors, and (b) in considering such applications, to undertake a comparison of disabled competitors and hypothetical able-bodied competitors as part of the individualized "reasonable modification" inquiry required under Title III, in order to accommodate disabled competitors.

The decision below conflicts squarely with the decision of the Ninth Circuit in *Martin* v. *PGA Tour, supra*, which was issued one day earlier and involved essentially similar facts. Instead of focusing on the basic nature, character, and purpose of the competition and the very real possibility that a competitor could gain a significant advantage from using a golf cart — as the courts below did in this case — the Ninth Circuit tried to decide whether Martin actually would gain an advantage over his hypothetical "able-bodied competitors." The question presented in Olinger's petition asks this Court to resolve which of these two irreconcilable approaches faithfully implements the

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[3] (...continued)
the PGA Tour. *Id.* Except for this one instance, the USGA has never granted an individual waiver of the rule requiring all competitors to walk the course during the U.S. Open (and its Qualifyings).

intent of Congress. In support of the judgment below,[4] we also respectfully submit that those questions need never be reached, because the ADA is simply inapplicable to the competitors in the U.S. Open and other championship-level athletic competitions.

Resolution of these questions is needed even more urgently because, since the Seventh and Ninth Circuits issued their rulings, another disabled golfer has obtained a permanent injunction prohibiting the USGA from enforcing its rule that competitors walk the course in the U.S. Senior Open and its Qualifyings. *Jones* v. *USGA*, No. A-00-CA-278 JN (W.D. Tex. Aug. 30, 2000). The USGA has appealed that decision, thus ensuring further litigation in the Fifth Circuit over the issues presented in this case. The existing conflict undoubtedly portends future cases in which plaintiffs will test whether the courts in their circuits will follow the courts below on the one hand, or the *Martin* and *Jones* courts on the other. Moreover, the context in which these judicial challenges will take place is not limited to golf. Other championship-level athletic competitions also are likely to face requests for waivers of their substantive rules.

I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER THE ORGANIZERS OF CHAMPIONSHIP-LEVEL ATHLETIC COMPETITIONS MUST ALTER THE SUBSTANTIVE RULES OF THE COMPETITIONS TO ACCOMMODATE DISABLED COMPETITORS.

The decision below is correct, both for a reason that the Seventh Circuit did not reach and for the reason that it did

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[4] See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 363 (7th ed. 1993).

reach. However, the decision below cannot honestly be reconciled with the Ninth Circuit's *Martin* decision.

A. The threshold question in this case is whether Title III of the ADA applies to the competition areas of championship-level athletic competitions. The text of the ADA expressly limits the scope of Title III to the twelve enumerated categories of "place[s] of public accommodation" set forth in 42 U.S.C. § 12181(7). Of these categories, only two conceivably could apply to any aspect of a championship-level athletic competition such as the U.S. Open. Title III clearly applies to "place[s] of exhibition or entertainment," and thus covers persons seeking access to sporting events as spectators. *Id.* § 12181(7)(C). Title III also applies to some venues that are sometimes used to conduct championship-level athletic competitions — including gymnasiums, bowling alleys, and golf courses — when those venues are used as "place[s] of exercise or recreation." *Id.* § 12181(7)(L).

The Seventh Circuit properly viewed with skepticism petitioner's contention — which the Ninth Circuit adopted in *Martin*, 204 F.3d at 997-99 — that the inclusion of a "golf course, or other place of exercise or recreation," in the enumerated categories of places of public accommodation evinced Congress's intent to extend the ADA to the competition areas of championship-level athletic competitions. As the Seventh Circuit noted expressly, under the Justice Department regulations implementing Title III, "an entity may simultaneously be both a place of public accommodation and a place that is not fully subject to Title III — in other words, a 'mixed use' facility." Pet. App. 10a. In addition, as the Seventh Circuit further observed, the Justice Department has determined that, "to the extent that a mixed use facility 'is not open to the general public,' it 'is not subject to the requirements for public accommodations.'" *Id.* (quoting 28 C.F.R. ch. 1, pt. 36, App. B, at 624).

Although the Seventh Circuit ultimately issued its decision without resolving this important question of statutory construction, the relevant statutory language, implementing regulations, and case law confirm that the golf courses used for the U.S. Open and its Qualifyings are mixed-use facilities during the competition. During the U.S. Open, the competition areas — *i.e.*, the areas inside the gallery ropes that separate the golf course and the competitors from the spectators — are off limits to members of the general public.[5] PI 50; TR 122. Because the competition areas are reserved for players, caddies, and officials, they are not "place[s] of public accommodation" covered by the ADA. At the same time, however, the areas outside the ropes (the spectator areas) at the U.S. Open are subject to, and are in compliance with, Title III of the ADA. In this case, Olinger seeks access to the golf courses used in the U.S. Open and its Qualifyings as a competitor, not as a spectator. Accordingly, Olinger cannot establish an essential element of his ADA claim — that he is denied access to a "place of public accommodation" on the basis of a disability.

B. The courts below held, correctly, that allowing an individual competitor to use a golf cart would "fundamentally alter the nature of" the U.S. Open — the national golf championship. As the Seventh Circuit remarked, in light of this Court's decision in *Davis,* "courts have repeatedly held that the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." Pet. App. 10a. Here, the USGA decided (i) to require competitors in the U.S. Open to demonstrate their abilities in every aspect of championship-level golf, including skilled shotmaking, physical endurance and stamina, and the ability to overcome fatigue, and (ii) to require all

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[5] In the Qualifyings, spectators similarly do not have access to the competition areas, even if it is not necessary to place ropes on the course (because there are few spectators). TR 92.

competitors to play by precisely the same rules. As the courts below concluded, those decisions manifestly make sense in light of the "basic nature, character, [and] purpose" of the U.S. Open, the men's national golf championship. Accordingly, the standards of the competition are exacting, and are enforced uniformly for all competitors. This is entirely proper under the ADA. As the courts below concluded in this case, any competitor who is permitted to use a golf cart may gain a significant advantage over other competitors, and any such advantage would compromise the integrity of the entire endeavor.

This conclusion was both rational and correct, and it is confirmed not only by the expert testimony of Dr. James Rippe (TR 37-54) (on whose testimony the district court, in particular, relied heavily, Pet. App. 30a-32a), but also by the crucible of everyday experience among professional golfers. As veteran PGA Tour competitor Ed Fiori recently commented, "[t]here are guys out here who are hurting — bad backs, bum feet and knees and everything else — and it's a definite advantage to play in a cart." Jeff Babineau, *Fiori Makes Cart Inquiry*, GOLFWEEK, Mar. 18, 2000, ¶ 5 (www.golfonline.com/news/golfweek/2000/march/fiori0318.html).

Moreover, the courts below reached the correct result by faithfully performing the "individualized inquiry" mandated by Seventh Circuit precedent and applied in the vast majority of ADA cases. Consistent with this Court's decision in *School Bd.* v. *Arline*, 480 U.S. 273, 287 (1987), the courts of appeals generally have undertaken an "individualized" approach to evaluating the reasonableness of accommodations under the ADA. See, *e.g.*, *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 851 (7th Cir.), cert. denied, 120 S. Ct. 579 (1999); *McPherson* v. *Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 462-63 (6th Cir. 1997) (en banc); *Johnson* v. *Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059-60 (5th Cir. 1997). Under an "individualized" approach, the courts have considered not only the general purposes behind a rule, but also the effect

that an exception for a disabled person would have on those purposes. See *Washington*, 181 F.3d at 851. As the Fifth Circuit has noted, the courts focus "on the specifics of the plaintiff's *or* defendant's circumstances and not on the general nature of the accommodation." *Johnson*, 116 F.3d at 1060 (emphasis added).[6]

In this case, the district court noted expressly that "[a] court deciding a case under the ADA must make an individualized decision concerning the plaintiff, but a court evaluating a requested accommodation's impact on the nature of an activity or program also must give full consideration to that impact." Pet. App. 34a. The court focused on the general purposes that underlie the rule requiring that all competitors walk the course — including the injection of stamina as an element of the competition and the preservation of uniform rules for all competitors. *Id.* at 30a-35a. The district court then examined the effect that granting the requested exception would have on those purposes, and concluded that such an exception would fundamentally alter the nature of the national championship by (i) potentially giving a competitor using a golf cart a substantial competitive advantage over a golfer who walks (*id.* at 30a-33a), (ii) imposing a significant, perhaps insurmountable, hardship on the USGA, which lacks the resources and expertise to evaluate each request for the use of a golf cart (*id.* at 33a), and (iii) injecting an element of discretion into what had previously been uniform rules for all competitors (*id.* at 34a-35a). In affirming the district court, the court of appeals specifically examined (i) "the nature of the 'program' to which Mr. Olinger seeks access: the U.S. Open" and (ii) whether granting the requested

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[6] One circuit has adopted a less stringent test, holding that waiver of an eligibility rule in a case under Title II of the ADA is not required in any circumstances if the rule itself is generally "an essential eligibility requirement." *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 931 (8th Cir. 1994).

accommodation "would alter the fundamental nature of that competition," *i.e.*, the U.S. Open, rather than a casual round of golf at the local links. *Id.* at 11a-13a.[7]

Unfortunately, however, this correct approach will not be followed uniformly unless this Court grants review and affirms. Although *Martin* purported to follow *Washington* and *Johnson* (see 204 F.3d at 1002), the *Martin* decision radically extended the "individualized" approach adopted in those cases and others like them. *Washington* and *Johnson* stand in the middle, and *Martin* at one extreme, of a three-way circuit split. Most pro-defendant is the Eighth Circuit's conclusion in *Pottgen* that a court may decide the reasonableness of a requested modification on the basis of a blanket assessment of whether the rule in question is essential to the program. Under *Washington* and *Johnson*, by contrast, a court also must determine whether the requested modification would have a "minimal" effect on the purposes underlying the rule in question (in which case the modification must be allowed) or, as here, a "fundamental" effect on those purposes (in which case the modification is not required). See, *e.g.*, *Washington*, 181 F.3d at 851-52. *Martin*, however, pushed the inquiry much further, requiring the PGA Tour to show that the level of fatigue that Martin would experience using a cart would be less than that experienced by hypothetical "able-bodied competitors" who were required to walk the course. See *Martin*, 204 F.3d at 1000; see also *Martin*, 994 F. Supp. at 1251-52. No other court of appeals has even remotely suggested that the ADA requires the type of purportedly precise calibration that was undertaken by the Oregon magistrate judge and the Ninth Circuit in *Martin*.

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[7] If the courts below had applied the test that the Eighth Circuit adopted in *Pottgen*, those courts would have reached the same result, but their analysis would have stopped with the finding that a competitor's ability to overcome fatigue is an essential element of championship-level golf competitions.

This Court's review is needed urgently, because the Ninth Circuit's decision departs radically from the sensible approach followed by most of the other courts of appeals (and by the courts below in this case). In the first place, the Ninth Circuit's decision forces the PGA Tour to change its basic nature by imposing more than one set of substantive rules for competitors in a championship-level athletic competition. Moreover, the new set of rules imposed by the Ninth Circuit is completely unworkable in practice, because it requires the entity conducting a championship-level golf competition to make scientific comparisons between (i) golfers with various disabilities and (ii) hypothetical "able-bodied competitors" — comparisons that highly credentialed scientists believe are literally impossible to make. As Dr. Rippe testified, the only way to know for certain whether a disabled golfer would get a physiological advantage from riding a golf cart would be to "put [the disabled golfer] and his clone out on a golf course and ask one of them to walk and the other to ride in a golf cart." TR 76. Neither the ADA nor any other law requires such an impossible inquiry. See *Perry* v. *Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) ("the law does not require the impossible"); *cf. Rosen* v. *Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (Posner, C.J.) ("Law lags science; it does not lead it"). The Court should grant review to affirm the Seventh Circuit's approach — which has been followed in the Fifth and Sixth Circuits as well — and reject the Ninth Circuit's anomalous approach.

C. The Seventh Circuit also observed, correctly, that under both the Rehabilitation Act and the ADA, "courts consistently have concluded that an accommodation is not reasonable if it imposes an undue financial and administrative burden." Pet. App. 13a; see also *Arline*, 480 U.S. at 287 n.17 (Rehabilitation Act); *Buckles* v. *First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (ADA case) ("an accommodation is unreasonable if it * * * 'imposes undue financial or administrative burdens'"); *Sandison* v. *Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995)

(ADA case) ("It is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage. * * * It is unreasonable to call upon coaches and physicians to make these near-impossible determinations").

Applying these decisions, the courts below held that the ADA does not require the USGA to "develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete." Pet. App. 16a, 41a. As those courts recognized, if the rule were modified to permit competitors to request waivers on an *ad hoc* basis, the USGA would be required to develop a staff of medical specialists available to evaluate waiver requests from any one of more than 7,000 competitors at 90 qualifying sites scattered across the country.

Moreover, even if the USGA had a large staff of medical specialists, it would be impossible to draw the appropriate lines in evaluating the myriad disabilities that conceivably could be used to justify a competitor's request for permission to use a golf cart. Although "'temporary, non-chronic impairments of short duration, with little or no longterm or permanent impact, are usually not disabilities'" under the ADA (*Sanders* v. *Arneson Prods.*, 91 F.3d 1351, 1354 (9th Cir. 1996)), there are countless golfers and other professional athletes who very well might qualify as disabled under the ADA on the basis of their physical ailments. As the Sixth Circuit has held in similar circumstances (see *Sandison*, 64 F.3d at 1035), no cadre of doctors and athletic officials can be expected to make the "near-impossible determinations" that would be required in deciding whether a waiver of the walking requirement would give a particular competitor an unfair advantage, or merely would bring him up to an equal level with his competitors.

The Ninth Circuit in *Martin* concluded that the individualized waiver determinations that its decision mandates do not pose any administrative difficulty. That conclusion conflicts

starkly with the decision below, and is simply untenable. As the undisputed testimony in this case establishes, there is no way to calibrate how much of a disadvantage a particular competitor's disability creates, and correspondingly there is no way to determine whether an accommodation for that competitor's disability merely negates the effect of the disability, or in fact overcompensates that competitor. As noted above, petitioner here has requested that the USGA make an inquiry that is literally impossible, because (as Dr. Rippe testified, TR 76) the only way to determine whether an individual competitor gains an advantage by using a golf cart is to run a battery of tests with that individual and his clone. Because that cannot be done, tournament officials who are forced by the *Martin* decision to evaluate individual requests for the use of a golf cart will be forced to engage in a speculative exercise, regardless of the other variables that are present. The approach taken by the courts below manifestly is superior, but it will not be followed in at least the Ninth Circuit unless this Court grants certiorari either in this case or in *Martin*, and endorses that approach.

II. THIS CASE PRESENTS IMPORTANT ISSUES THAT ONLY THIS COURT CAN RESOLVE DEFINITIVELY.

A. Without This Court's Review, The Existing Circuit Split Will Spawn More Litigation, And Different Substantive Rules Of Competition Will Apply To Different Golfers In The National Championship.

The Seventh Circuit's decision in this case and the Ninth Circuit's decision in *Martin* are squarely inconsistent. Olinger and Martin have similar disabilities, yet Martin is permitted to ride a golf cart in championship-level competitions while Olinger is not. As things now stand, disabled golfers who litigate in the nine states that comprise the Ninth Circuit probably will be able to use a golf cart in future championship-level competitions, pursuant to binding circuit precedent. Disabled golfers in the same competitions who are subject to the

jurisdiction of federal courts in Indiana, Illinois, or Wisconsin will not be able to use a golf cart, on the basis of equally binding circuit precedent. As commentators have recognized, the two decisions are fundamentally incompatible. See Ted Curtis, *Ticket to Ride? Circuits Disagree on Whether the ADA Requires Golf Tournaments to Let Disabled Players Use Carts*, ABA J., May 2000, at 24 (discussing the "conflicting" decisions in *Olinger* and *Martin*, which involve the "[s]ame sport, same disability, same legal issue"); Marcia Chambers, *PGA Tour Seeks Review of Martin Golf-Cart Suit*, N.Y. TIMES, July 4, 2000 (national ed.), at C19 (noting the "conflict the Tour and the United States Golf Association now face in the many states where their tournaments are held and where different rulings apply").[8]

Unless this Court provides definitive guidance, it is likely that similar suits filed by other golfers will continue to bedevil the lower courts and the USGA. Indeed, the Texas district

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[8] See also, *e.g.*, Robert S. Shwarts, *A Good Walk Spoiled: The 9th Circuit Improves Its Lie*, Mar. 23, 2000, ¶ 1 (www.lawnewsnetwork.com/opencourt/stories/A19345-2000Mar22.html) (the *Olinger* and *Martin* courts issued "rulings interpreting the same statute, analyzing almost identical facts, and reaching entirely opposite results"); Mark R. Madler, *Fed Circuits Suddenly Split on Handicapped Golfers*, Mar. 9, 2000, ¶¶ 1, 6 (www.lawnewsnetwork.com/stories/A18189-2000Mar8.html) (the Seventh and Ninth Circuits issued "opposing decisions" in cases involving "remarkably similar facts" and largely "the same issues"); *Is Competitive Golf Different in Different States?*, DON KRAMER'S NONPROFIT ISSUES, March 2000, ¶ 1 (www.nonprofitissues.com/lead/100mar.html) ("Is a golf tournament in Indiana fundamentally different from a golf tournament in Oregon? That's the impression you'd get from reading the conflicting opinions recently released" by the Seventh and Ninth Circuits).

court's resolution of the *Jones* action cited above (which action was filed shortly after the Ninth Circuit's *Martin* decision), has made the already "unsettled state of affairs * * * even more complicated." Chambers, *PGA Tour Seeks Review*, N.Y. TIMES, July 4, 2000, at C19. See also *Jones Says Competing Is His Victory*, AP June 19, 2000, ¶ 2 (www. espn.go.com/golfonline /tours/s/2000/0619/593987.html) (noting that Jones shot an 84 and missed qualifying for the U.S. Senior Open by 15 strokes).

Other suits undoubtedly will follow in the wake of *Martin* and *Jones*. PGA Tour competitor Ed Fiori has stated that he would like to use a cart because of his chronic back problems, and he "says there are 10 or 12 others who'd like to join him." Jeff Babineau, *Fiori Makes Cart Inquiry*, GOLFWEEK, Mar. 18, 2000, ¶ 1 (www.golfonline.com/news/golfweek/2000/march/ fiori0318.html). When the field of possible plaintiffs is expanded from the 300 or so touring professionals, see FEINSTEIN, A GOOD WALK SPOILED 465, to the 3,000+ entries for this year's U.S. Senior Open, and the 8,400+ entries for this year's U.S. Open, Joe Gordon, *Golf*, BOSTON HERALD, May 7, 2000, at B14, it is readily apparent that the litigation burden could be substantial.[9]

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[9] Some 43 million Americans, roughly one in seven, have disabilities that are covered by the ADA. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 484-486 (1999); 42 U.S.C. § 12101(a)(1). Even if the percentage of championship-level golfers who meet the statutory definition is much smaller, the number of disabled golfers wanting to use carts is likely to be considerable. This is especially true if one includes as potential litigants the golfers whose physical conditions are at (or outside) the margins of ADA coverage. See Babineau, *Fiori Makes Cart Inquiry*, GOLFWEEK, Mar. 18, 2000, ¶ 5 (quoting Ed Fiori as stating that some touring professionals with "bad backs, bum feet and knees" would like to use carts). When senior golfers

(continued...)

The prospect of more litigation is particularly unsettling because the U.S. Open is a national championship involving golfers who live, and qualifying rounds that occur, throughout the country. As a result, the USGA is subject to suit under the ADA throughout the country. See 28 U.S.C. § 1391(b)(2) (non-diversity suits may be brought in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred"). In short, unless this Court provides a definitive answer to the question whether the ADA requires the USGA to abandon its longstanding prohibition on the use of golf carts in the U.S. Open, the existing circuit split virtually guarantees that courts will continue to wrestle with this issue.[10]

In the meantime, the current division in the circuits means that various competitors in the U.S. Open and its Qualifyings may be governed by fundamentally different substantive rules. This is not the way to conduct the national championship — an event that has been described as "the world's greatest test of golf." FEINSTEIN, A GOOD WALK SPOILED 332. Championship-level golf, like all other championship-level athletic competitions, is designed to produce a champion from among competitors who perform under uniform rules. For more than

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[9] (...continued)
are considered, it is even more likely that players will seek to use carts, particularly in light of the *Jones* decision; even healthy senior golfers often prefer carts. See Gerald Eskenazi, *Watson Cites Boon of Senior Tour: No Woods*, N.Y. TIMES, June 22, 2000 (national ed.), at C28 (quoting Tom Watson, now playing on the Senior Tour, as stating, "I use the cart a lot now").

[10] The clear-cut split in the lower courts also raises concerns about forum shopping. Golfers wanting to use carts are likely to try to bring suit in the Ninth Circuit, where the outcome probably is preordained because of *Martin*.

100 years, the USGA has required the competitors in the U.S. Open to walk during each round, often for more than 5½ hours a day under a broiling sun, in order to make the ability to overcome fatigue an essential part of the gauntlet that the champion must endure. See *Martin*, 994 F. Supp. at 1250 ("the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making"); FEINSTEIN, A GOOD WALK SPOILED 332-33, 341-42 (discussing the brutal conditions during the 1994 U.S. Open at Oakmont, outside Pittsburgh); CURT SAMPSON, HOGAN 139-47 (1996) (describing Ben Hogan's victory in the 1950 U.S. Open even though Hogan was barely able to walk at times, because of injuries that he had suffered in a near-fatal car accident).[11]

The courts below understood the critical importance of walking the course in championship-level golf, as a means of formulating an appropriately difficult test for determining the national champion and ensuring that the test is administered uniformly to all competitors. In this regard, the court of appeals found "particularly persuasive" the testimony of Ken Venturi, a professional golfer who for the last 31 years has been the golf analyst for CBS Sports. Pet. App. 12a. In 1964, Venturi won the U.S. Open in "grueling conditions" that included near-100 degree temperatures and 97 percent humidity. *Id.* As the court of appeals summarized, "[i]n the stifling heat and humidity, battling dehydration, Venturi walked the course and, on the verge of collapse, won the tournament." *Id.* The court of

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[11] Of course, the amount of time spent in hot, humid conditions is much greater if the golfers are required to play more than 18 holes in a day, as they must during sectional qualifying for the U.S. Open (36 holes) or if weather problems delay play. See Gary Reinmuth, *Struggle to Make Field Goes Overtime*, CHICAGO TRIBUNE, July 4, 2000, § 4, at 5 (describing a golfer who had to play 34 holes on the second day of this year's U.S. Open — June 16, 2000).

appeals credited Venturi's testimony that any competitor who would have been permitted to use a golf cart in those conditions would have had a "tremendous advantage." *Id.* at 13a. And the court concluded that Venturi's "testimony regarding the 1964 U.S. Open, by itself, supports the golf community's insistence that all players play all tournaments under the same conditions and rules." *Id.* at 12a.

The U.S. Open has long played a prominent role in American sports history. And until the golf cart controversy arose, exactly the same rules of competition have applied to all of the competitors in each U.S. Open since the championship was first held in 1895. The golfers who participate in the U.S. Open (who are playing for a chance at sports immortality and millions of dollars in prize money), the millions of devoted golf fans who follow the tournament, and the USGA itself, all have a keen interest in whether the substantive rules of competition will remain uniform or, instead, whether some competitors will be exempt from the longstanding rule that adds a particular physical requirement to a championship-level athletic competition that rewards physical skill. Permitting some golfers to use carts would "change[] the nature of professional golf tournaments forever." Shwarts, *A Good Walk Spoiled: The 9th Circuit Improves Its Lie*, Mar. 23, 2000, ¶ 3. The far-reaching nature of that change warrants this Court's review, so that the issue is decided once and for all, thereby removing the uncertainty about the rules that apply to the national championship.

B. This Case Has Broad Ramifications For Other Championship-Level Athletic Competitions.

The questions presented here concerning the scope of Title III have broad ramifications not only for golf, but for all championship-level athletic competitions. As several commentators have pointed out, the golf cart controversy litigated here and in *Martin* has, for the first time, extended the reach of the ADA to the realm of championship-level sports. *E.g.*, Todd

A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans With Disabilities Act*, 18 LAW & INEQ. J. 131, 148 (Winter 2000) ("Although several spectators have requested that covered entities comply with the ADA's accessibility requirements with respect to watching professional sports, Casey Martin and Ford Olinger are the only two athletes to claim that the ADA should apply to the playing of professional sports"); W. Kent Davis, *Why is the PGA Teed Off at Casey Martin? An Example of How the Americans With Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L.J. 1, 3 (Fall 1998) (noting that Martin's case is "the first to apply [the ADA] * * * to professional sports"). Prior ADA cases frequently have involved eligibility rules in scholastic and intercollegiate athletics, but none has involved an attempt by a professional athlete to obtain a waiver of a substantive rule of his or her sport. Unless this Court acts to cabin the Ninth Circuit's impulse to extend the reach of the ADA to places that Congress never contemplated — to decide, without congressional warrant, that the disabled must be given a way to be competitive in events whose very purpose is to determine the most *physically able* competitors according to predetermined, uniformly applied rules of competition — then this case and *Martin* may prove to be "watershed event[s]" that "interject[] the ADA into professional sports." *Id.* at 4; see also Dave Addis, *Can Allowances For Disabilities Work In Sports?*, VIRGINIAN-PILOT & LEDGER-STAR, JAN. 18, 1998, at J1 ("a precedent in Martin's case would become an immediate problem when applied to other professional sports, which is certain to happen in a society where pro-sports venues are drowning in dollars and lawyers").

The reality that modifying the basic rules of a championship-level competition would "fundamentally alter" the nature of that competition is by no means limited to golf. Any number of examples from other sports illustrate this point. Olympic gold medalist Jackie Joyner-Kersee and tennis

champion Jimmy Connors have asthma. Must they be permitted extra time between long jumps and tennis sets because asthma adversely affects their ability to recuperate? Must a biathlete with hypertension be permitted to take extra time between the long-distance skiing and the shooting competition?[12] A request by a competitor to modify the time rules in any of these championship-level athletic competitions on the basis of an asserted impairment of his or her ability to cope effectively with the physical stress of the competition — like petitioner's request to use a golf cart in the U.S. Open and its Qualifyings — would eliminate an essential element of the respective competitions.

These examples highlight the fundamental tension between the ADA-based accommodation imposed by the Ninth Circuit in *Martin* and the realities of championship-level athletic competitions. Athletic competition tests the ability of people with different physical abilities to compete against each other under uniform rules. Sometimes brute strength prevails. In other instances, stamina, guile, or luck accounts for the result. The point is that within the rules of the game, competitors try to play to their strengths and overcome their weaknesses. Whatever "fairness" may mean in other aspects of life — where, for example, it may be grossly unfair to treat one scientist or lawyer differently from another based on physical abilities, because physical abilities are not the relevant skills — "fairness" in championship-level athletic competitions ordinarily means that everyone competes under the same rules. Equality of opportunity is not the criterion of fairness in an athletic competition, because the very purpose of an athletic competition is to ascertain who is most physically excellent in the skills being tested. And compensation for physical

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[12] To cite just one more example, must that biathlete be permitted to take drugs to combat hypertension, even if those drugs are otherwise banned as performance enhancing?

disabled competitors and hypothetical able-bodied competitors as part of Title III's individualized "reasonable modification" inquiry. The record in this case is both cleaner and more fully developed. Most significantly, the record here includes testimony and cross-examination on the science relating to the physiological effects of walking versus using a golf cart. This record — unlike the record in *Martin* — also contains a comprehensive and well-reasoned expert report on that science.

Furthermore, in this case the parties agree on the need for, and desirability of, immediate review by this Court, whereas in *Martin* the parties are in disagreement. Accordingly, we respectfully submit that if the Court should choose to give plenary review to one of these two conflicting cases and hold the other case, it should grant Olinger's petition.[14]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] Granting Olinger's petition and holding the PGA Tour's petition in *Martin* would have an additional advantage: if this Court agrees with the Seventh Circuit's analysis, it could then allow the Ninth Circuit to sort out, in the first instance, whether the two apparently very similar cases really do (as Martin's brief in opposition contends) turn on fine factual distinctions.

Respectfully submitted.

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shortcomings is not a common feature of championship-level athletic competitions, in which the winners generally are those competitors who overcome whatever physical shortcomings they may have.[13]

The courts below recognized this tension, and further understood that Congress enacted the ADA to ensure that disabled persons have access to places that are accessible "indiscriminately to other members of the general public" (Pet. App. 7a), not to inject the federal judiciary into the micromanagement of championship-level athletic competitions. As the Seventh Circuit sensibly concluded, whether the rules of championship-level golf "should be adjusted to accommodate [the plaintiff] is best left to those who hold the future of golf in trust." Pet. App. 14a.

The Ninth Circuit in *Martin* obviously did not share that view. The conflict between the two decisions — with its implications for golf and for other championship-level athletic competitions — deserves review by this Court.

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[13] The annals of sports history contain many examples in which disabled competitors have struggled to compete — sometimes with amazing success — under the uniform rules that governed their particular sport. Major league baseball pitcher Jim Abbott was forced to both field his position and take a turn at bat, even though he was born without a right arm. No rules of baseball were modified to accommodate Abbott's disability. Golfer Ben Hogan was not permitted to use a golf cart in championship-level competitions, even though the debilitating injuries that Hogan sustained in a near-fatal automobile accident resulted in a "permanent loss of stamina" that forced Hogan to reduce his annual tournament appearances from thirty to approximately five. See SAMPSON, HOGAN 139.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING BOTH QUESTIONS PRESENTED.

The questions presented in this case seek the Court's guidance regarding the applicability of an important federal statute, the Americans with Disabilities Act, to championship-level athletic competitions. Unless this Court grants certiorari, litigation over the use of golf carts is likely to become a cottage industry for organizers of, and participants in, championship-level golf competitions. If the *Jones* litigation cited above is any indicator, the battle lines are already drawn — with golf's governing bodies advocating the Seventh Circuit's approach and would-be golf cart users relying on the Ninth Circuit's approach. And if the prognosticators are correct, the golf cart controversy is likely to be replicated as championship-level athletes in other sports who are (or become) functionally disabled seek greater access to the fame and fortune associated with sports in twenty-first-century America. For all of these reasons, both questions presented are worthy of this Court's immediate attention.

Moreover, this case is an appropriate vehicle for resolving both questions. The first question — whether Title III of the ADA applies to the competition areas of championship-level athletic competitions held at places of public accommodation — presents a pure question of law concerning the proper construction of a federal statute and its implementing regulations. Accordingly, either this case or *Martin* (in which a petition for writ of certiorari is pending before the Court) would be an appropriate vehicle for deciding the issue.

However, this case is the better vehicle for consideration of the second question — whether, if Title III does apply to the competition areas, it requires the organizers of championship-level athletic competitions (a) to consider applications for selective waivers of the uniform rules of those competitions in order to accommodate disabled competitors, and (b) in considering such applications, to undertake a comparison of